Hondaafushi Investments Pvt Ltd & Ors v Export-Import Bank Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-160–03 OF 2023
ONG CHEE KWAN J
25 SEPTEMBER 2023

Civil Procedure — Injunction — Anti-suit injunction — Application for — Plaintiffs filed anti-suit injunction application to restrain prosecution of action filed by defendant against plaintiffs — Whether injunction ought to be allowed

Civil Procedure — Striking out — Application for — Plaintiffs filed action against defendant more than three years after institution of defendant's suit against plaintiffs — Application by defendant to strike out action by plaintiffs — Whether plaintiffs' suit abuse of court process

There were two applications ie: (a) the plaintiffs' application for an anti-suit injunction ('the anti-suit injunction application') to restrain the prosecution of the action filed by the defendant against the plaintiffs in the Republic of Maldives ('Maldives') that was commenced in 2019 ('the Maldives suit'); and (b) the defendant's application to strike out the action ('the striking out application') filed by the plaintiffs ('the Malaysian suit'). The first plaintiff was a company incorporated under the laws of Maldives and the second to fourth plaintiffs were its directors and permanent residents of Maldives. The defendant was a bank incorporated in Malaysia. In 2005, the Government of Maldives granted the second plaintiff a 35-year lease over the Hondaafushi Island located in Maldives for the purposes of constructing and developing a luxury tourist resort on the island ('the project'). The defendant agreed to grant the first plaintiff a term loan in the amount of USD17.6m ('the loan facility') to part-finance the development and construction of the project. However, the first plaintiff failed and/or neglected to service the loan facility and the loan facility became impaired. The first plaintiff and the defendant then executed a restructuring agreement but was also breached by the plaintiffs. The defendant issued a notice of termination to terminate and recall the loan facility and/or restructured loan facility. The defendant commenced the Maldives suit against the plaintiffs to enforce its right under the said agreements. The plaintiffs filed their first procedural objection in the Maldives suit to dismiss the defendant's Maldives suit and this was dismissed by the Maldives Court. The plaintiffs then filed a second procedural objection in the Maldives suit where they sought to strike out the Maldives suit on the basis that it was filed in the absence of a board resolution. The second procedural objection remained undetermined by

the Maldives Court. More than three years after the institution of the Maldives suit, the plaintiffs filed the present Malaysian suit for declaratory orders, inter alia, that the loan facility agreement, restructuring agreement and/or the security agreements thereunder were null, void and/or unenforceable, and for a perpetual injunction to restrain the defendant from prosecuting its Maldives suit. The plaintiffs had also concurrently filed the anti-suit injunction application to restrain the defendant from, inter alia, prosecuting and/or taking any further steps against the plaintiffs in the Maldives suit, pending the final disposal of the Malaysian suit. In turn, the defendant filed the striking out application to strike out the Malaysian suit.

Held, allowing the defendant's application and dismissing the plaintiffs' application:

(1) The plaintiffs had filed their first procedural objection in the Maldives suit to challenge the Maldives Court's jurisdiction over the present dispute. The grounds raised by the plaintiffs in the first procedural objection went beyond challenging the jurisdiction, and had in fact, delved into the substantive merits of the defendant's claim in the Maldives suit. By invoking the Maldives Court's jurisdiction to consider the merits of the defendant's claim in the first procedural objection itself, the plaintiffs had in fact unequivocally submitted to the jurisdiction to the Maldives Court to litigate the subject matter of the present dispute. Further, the plaintiffs' action and/or conduct in the Maldives suit following the dismissal of the first procedural objection clearly demonstrated their unequivocal intention to submit to the jurisdiction of the Maldives Court. The plaintiffs could not be allowed to blow hot and cold or approbate and reprobate by belatedly challenging the jurisdiction of the Maldives Court and at the same time invoking the Maldives Court's jurisdiction to consider the merits of their defence in the Maldives suit. This amounted to a clear abuse of process on the plaintiffs' part (see paras 32, 35 & 39–40).

(2) The plaintiffs' real and/or dominant purpose in filing the Malaysian suit was not to obtain genuine redress. Instead, the plaintiffs initiated these proceedings more than three years after the filing of the Maldives suit, were hoping to achieve the following collateral purposes and/or ulterior motives: (a) to use the Malaysian suit as an instrument to undermine and/or to negate the Maldives civil court's judgment, and to relitigate the jurisdictional and limitation issues before the Malaysian court, despite having previously failed to obtain a favourable ruling from the Maldives Court on these very same issues; and (b) to defend against and/or defeat the defendant's action in the Maldives suit, which at all material times was properly instituted in good faith. Hence, the Malaysian suit amounted to a blatant abuse of court process (see paras 41 & 44).

(3) The filing of the Malaysian suit also fell foul of the rule against multiplicity of proceedings. The subject matter of the present suit was identical to that of the defendant's Maldives suit. For this reason, the Malaysian suit raised the very same facts and issues arising out of and/or in connection with the same agreements, which was currently being litigated by the same parties before the Maldives Court in the Maldives suit. Furthermore, the reliefs sought by the plaintiffs in the Malaysian suit was in direct conflict with the reliefs sought by the defendant in the ongoing Maldives suit. If both actions were allowed to proceed in their respective jurisdictions, there was a significant risk of conflicting decisions being rendered by both courts on the same subject matter. This was plainly contrary to the very principle underlying the rule against multiplicity of proceedings. The belated filing of the Malaysian suit which gave rise to a multiplicity of proceedings was a clear abuse of process by the plaintiffs. Immediate striking out of the Malaysian suit was warranted (see paras 45 & 47–49).

(4) The Maldives suit could not be said to be vexatious or oppressive at all. The Maldivian court stood as the most appropriate forum and/or forum conveniens for the present dispute at the material time the Maldives suit was filed. The balance of justice lied in favour of refusing the anti-suit injunction sought by the plaintiffs for the following reasons: (a) in the event the defendant was restrained from prosecuting its bona fide claim against the plaintiffs in the Maldives suit, serious and irreparable prejudice would be occasioned to the defendant as it would be unjustly deprived of the legitimate advantages it would have derived from having the present dispute heard in Maldives; (b) the filing of the Malaysian suit and/or anti-suit injunction application was a clear abuse of court process as it was filed with the collateral purpose of defeating the defendant's action in the Maldives suit; (c) the plaintiffs would not suffer any prejudice if the present dispute was heard before the Maldives Court because: (i) the plaintiffs themselves were a company incorporated in Maldives and/or were individuals residing permanently in Maldives. As such, there was no inconvenience occasioned to the plaintiffs if the dispute was likewise dealt with in Maldives; (ii) the plaintiffs had already unequivocally submitted to the jurisdiction of the Maldives Court to litigate the subject matter of the present dispute a long time ago; and (iii) the plaintiffs would still be able to present their defence before a competent Maldives Court; and (d) there had been an inordinate delay of more than three years on the plaintiffs' part in filing the present anti-suit injunction application, with no reasonable explanation being proffered by the plaintiffs to justify such an inordinate delay. Premised on the plaintiffs' inordinate delay in filing the injunction application, the granting of an injunction to restrain the Maldives suit at this stage would present a great and undue interference in the judicial process of the

Maldives Court, contrary to the principle of comity. Therefore, the anti-suit injunction application must fail (see paras 58–59, 64, 67 & 71).

[Bahasa Malaysia summary

Terdapat dua permohonan iaitu: (a) permohonan plaintif untuk mendapatkan injunksi anti-saman ('permohonan injunksi anti-saman') untuk menghalang pendakwaan tindakan yang difailkan oleh defendan terhadap plaintif di Republik Maldives ('Maldives') yang dimulakan pada 2019 ('saman Maldives'); dan (b) permohonan defendan untuk membatalkan tindakan ('permohonan pembatalan') yang difailkan oleh plaintif ('saman Malaysia'). Plaintif pertama ialah sebuah syarikat yang diperbadankan di bawah undang-undang Maldives dan plaintif kedua hingga keempat ialah pengarahnya dan penduduk tetap Maldives. Defendan adalah sebuah bank yang diperbadankan di Malaysia. Pada tahun 2005, Kerajaan Maldives memberikan plaintif kedua pajakan selama 35 tahun ke atas Pulau Hondaafushi yang terletak di Maldives untuk tujuan membina dan membangunkan resort pelancongan mewah di pulau itu ('projek'). Defendan bersetuju memberikan plaintif pertama pinjaman berjangka berjumlah USD17.6 juta ('kemudahan pinjaman') untuk membiayai sebahagian pembangunan dan pembinaan projek. Walau bagaimanapun, plaintif pertama gagal dan/atau mengabaikan kemudahan pinjaman dan kemudahan pinjaman menjadi terjejas. Plaintif pertama dan defendan kemudiannya melaksanakan perjanjian penstrukturan semula tetapi juga telah dilanggar oleh plaintif. Defendan mengeluarkan notis penamatan untuk menamatkan dan menarik balik kemudahan pinjaman dan/atau kemudahan pinjaman penstrukturan semula. Defendan memulakan saman Maldives terhadap plaintif untuk menguatkuasakan haknya di bawah perjanjian tersebut. Plaintif memfailkan bantahan prosedur pertama mereka dalam saman Maldives untuk menolak saman Maldives defendan dan ini telah ditolak oleh Mahkamah Maldives. Plaintif kemudian memfailkan bantahan prosedur kedua dalam saman Maldives di mana mereka memohon untuk membatalkan saman Maldives atas dasar ia difailkan tanpa adanya resolusi lembaga. Bantahan prosedur kedua masih tidak ditentukan oleh Mahkamah Maldives. Lebih tiga tahun selepas permulaan saman Maldives, plaintif memfailkan saman Malaysia sekarang untuk perintah pengisytiharan, antara lain, bahawa perjanjian kemudahan pinjaman, perjanjian penstrukturan semula dan/atau perjanjian sekuriti di bawahnya adalah terbatal, tidak sah dan/atau tidak boleh dikuatkuasakan, dan untuk injunksi kekal untuk menghalang defendan daripada pendakwaan saman Maldivesnya. Plaintif juga secara serentak memfailkan permohonan injunksi anti-saman untuk menghalang defendan daripada, antara lain, mendakwa dan/atau mengambil sebarang langkah lanjut terhadap plaintif dalam saman Maldives, sementara menunggu pelupusan akhir saman Malaysia. Dengan itu, defendan memfailkan permohonan pembatalan untuk membatalkan saman Malaysia.

Diputuskan, membenarkan permohonan defendan dan menolak permohonan plaintif:

(1) Plaintif telah memfailkan bantahan prosedur pertama mereka dalam saman Maldives untuk mencabar bidang kuasa Mahkamah Maldives ke atas pertikaian sekarang. Alasan yang dibangkitkan oleh plaintif dalam bantahan prosedur pertama melangkaui mencabar bidang kuasa, dan sebenarnya, telah menyelidiki merit substantif tuntutan defendan dalam saman Maldives. Dengan menggunakan bidang kuasa Mahkamah Maldives untuk mempertimbangkan merit tuntutan defendan dalam bantahan prosedur pertama itu sendiri, plaintif sebenarnya telah dengan jelas menyerahkan bidang kuasa kepada Mahkamah Maldives untuk membicarakan perkara pertikaian sekarang. Selanjutnya, tindakan dan/atau kelakuan plaintif dalam saman Maldives berikutan penolakan bantahan prosedur pertama jelas menunjukkan niat mereka yang tidak berbelah bahagi untuk tertakluk kepada bidang kuasa Mahkamah Maldives. Plaintif-plaintif tidak boleh dibenarkan bertukar fikiran atau approbate dan reprobate dengan secara lewat mencabar bidang kuasa Mahkamah Maldives dan pada masa yang sama memohon bidang kuasa Mahkamah Maldives untuk mempertimbangkan merit pembelaan mereka dalam saman Maldives. Ini merupakan penyalahgunaan proses yang jelas di pihak plaintif (lihat perenggan 32, 35 & 39–40).

(2) Tujuan sebenar dan/atau dominan plaintif memfailkan saman Malaysia adalah bukan untuk mendapatkan ganti rugi yang sebenar. Sebaliknya, plaintif memulakan prosiding ini lebih daripada tiga tahun selepas pemfailan saman Maldives, berharap untuk mencapai tujuan cagaran dan/atau motif tersembunyi berikut: (a) untuk menggunakan saman Malaysia sebagai instrumen untuk melemahkan dan/atau untuk menafikan penghakiman mahkamah sivil Maldives, dan untuk mengadili semula isu bidang kuasa dan had masa di hadapan mahkamah Malaysia, walaupun sebelum ini gagal mendapatkan keputusan yang menggalakkan daripada Mahkamah Maldives mengenai isu yang sama ini; dan (b) untuk mempertahankan terhadap dan/atau mengalahkan tindakan defendan dalam saman Maldives, yang pada setiap masa material telah dimulakan dengan betul dengan niat baik. Oleh itu, saman Malaysia itu merupakan penyalahgunaan proses mahkamah secara terang-terangan (lihat perenggan 41 & 44).

(3) Pemfailan saman Malaysia juga melanggar peraturan terhadap prosiding berganda. Perkara saman sekarang adalah sama dengan saman Maldives defendan. Atas sebab ini, saman Malaysia membangkitkan fakta dan isu yang sama yang timbul daripada dan/atau berkaitan dengan perjanjian yang sama, yang kini sedang dibicarakan oleh pihak yang sama di hadapan Mahkamah Maldives dalam saman Maldives. Tambahan pula, relif yang dipohon oleh plaintif dalam saman Malaysia adalah

bercanggah secara langsung dengan relif yang dipohon oleh defendan dalam saman Maldives yang sedang berjalan. Jika kedua-dua tindakan dibenarkan untuk diteruskan dalam bidang kuasa masing-masing, terdapat risiko besar keputusan bercanggah yang dibuat oleh kedua-dua mahkamah mengenai perkara yang sama. Ini jelas bertentangan dengan prinsip yang mendasari peraturan menentang prosiding berganda. Kelewatan memfailkan saman Malaysia yang menimbulkan prosiding berganda adalah penyalahgunaan proses yang jelas oleh plaintif. Tindakan pembatalan serta-merta saman Malaysia adalah wajar (lihat perenggan 45 & 47–49).

(4) Saman Maldives tidak boleh dikatakan menyusahkan atau menindas sama sekali. Mahkamah Maldives berdiri sebagai forum dan/atau forum conveniens yang paling sesuai untuk pertikaian pada masa material saman Maldives difailkan. Imbangan keadilan memihak kepada penolakan injunksi anti-saman yang dipohon oleh plaintif atas sebab-sebab berikut: (a) sekiranya defendan dihalang daripada mendakwa tuntutan bona fidenya terhadap plaintif dalam saman Maldives, prejudis yang serius dan tidak boleh diperbaiki akan ditimbulkan kepada defendan kerana ia akan dilucutkan secara tidak adil daripada kelebihan sah yang akan diperolehi daripada pertikaian yang didengar di Maldives; (b) pemfailan saman Malaysia dan/atau permohonan injunksi anti-saman adalah penyalahgunaan proses mahkamah yang jelas kerana ia difailkan dengan tujuan cagaran untuk mengalahkan tindakan defendan dalam saman Maldives; dan (c) plaintif tidak akan mengalami sebarang prejudis sekiranya pertikaian ini dibicarakan di hadapan Mahkamah Maldives kerana: (i) plaintif sendiri adalah sebuah syarikat yang diperbadankan di Maldives dan/atau merupakan individu yang menetap secara tetap di Maldives. Oleh yang demikian, tidak ada kesulitan yang ditimbulkan kepada plaintif sekiranya pertikaian itu juga diuruskan di Maldives; (ii) plaintif telah dengan jelas menyerahkan kepada bidang kuasa Mahkamah Maldives untuk membicarakan perkara pertikaian ini masa dahulu; dan (iii) plaintif masih boleh mengemukakan pembelaan mereka di hadapan Mahkamah Maldives yang kompeten; dan (d) telah berlaku kelewatan yang melampau selama lebih daripada tiga tahun di pihak plaintif dalam memfailkan permohonan injunksi anti-saman sekarang, dengan tiada penjelasan munasabah yang dikemukakan oleh plaintif untuk mewajarkan kelewatan yang melampau itu. Berdasarkan kelewatan melampau plaintif dalam memfailkan permohonan injunksi, pemberian injunksi untuk menghalang saman Maldives pada peringkat ini akan menimbulkan campur tangan yang besar dan tidak wajar dalam proses kehakiman Mahkamah Maldives, bertentangan dengan prinsip komiti. Oleh itu, permohonan injunksi anti-saman harus gagal (lihat perenggan 58–59, 64, 67 & 71).]

Cases referred to

BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70, CA (refd)
Barclays Bank plc v Homan and others [1993] BCLC 680, Ch D (refd)
Dulles' Settlement Trusts; Dulles v Vidler, Re [1951] Ch 842, CA (refd)
Ecobank Transnational Inc v Tanoh [2016] 1 WLR 2231, CA (refd)
Koh Kay Yew v Inno-Pacific Holdings Ltd [1997] 3 SLR 121, CA (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793, SC (refd)
Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit [2019] MLJU 477; [2019] 1 LNS 771, CA (refd)
Perkasa Padu Sdn Bhd v Rayong ak Nuing & Ors [2009] 1 MLJ 268, HC (refd)
Societe Nationale Industrielle Aerospatiale v Lee Kui Jak & Ors [1987] 2 MLJ 397, PC (refd)
Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460, HL (refd)
Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] MLJU 105; [2001] 4 CLJ 52, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, item 11
Development Financial Institution Act 2002
Limitation Act 1953 s 6, 6(1)(a)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Paul Ong Teng Kek (with Gabriel Daniel and Soo San San) (Paul Ong & Assoc) for the plaintiffs.
Manshan Singh (with Ho Pui Yan) (Skrine) for the defendant.

Ong Chee Kwan J:

INTRODUCTION

[1] This judgment deals with two applications. The first is the application under encl 3 ('the anti-suit injunction application') filed by the plaintiffs for an anti-suit injunction to restrain the prosecution of the action filed by the defendant against the plaintiffs in the Republic of Maldives that was commenced in 2019 ('the Maldives suit'). The second is the application under encl 14 ('the striking out application') filed by the defendant to strike out this action filed by the plaintiffs ('the Malaysian suit').

[2] I dismissed the anti-suit injunction application and allowed the striking out application.

BACKGROUND FACTS

[3] The first plaintiff is a company incorporated under the laws of the Republic of Maldives ('Maldives'). The second to fourth plaintiffs are the directors of the first plaintiff and are permanent residents of the Maldives.

[4] The defendant is a bank incorporated in Malaysia, and is a licensed development financial institution under the Development Financial Institution Act 2002.

[5] In 2005, by way of the lease agreement dated 5 May 2005, the Government of Maldives granted the second plaintiff a 35 years lease ('lease') over the Hondaafushi Island located in South Thiladhummathee Atoll, Maldives ('Hondaafushi Island'), for the purposes of constructing and developing a luxury tourist resort ('Resort') on the island (collectively, 'project').

[6] By way of the letter of offer dated 26 July 2006 ('letter of offer') and the facility agreement executed between the first plaintiff and the defendant, the defendant agreed to grant the first plaintiff a term loan amounting to USD17.6m under the buyer credit facility ('loan facility') to part-finance the development and construction of the project.

[7] In accordance with the express terms and conditions of the letter of offer and or facility agreement, the plaintiffs and the defendant executed a number of security agreements for the purpose of securing the first plaintiff's performance under the loan facility. This includes, inter alia, the mortgage agreement dated 6 November 2006 ('mortgage agreement') executed between the second plaintiff and the defendant, wherein the second plaintiff had granted the defendant a first priority mortgage over the lease of the Hondaafushi Island (including the second plaintiff's leasehold interest in the Resort).

[8] In breach of the facility agreement, the first plaintiff failed and or neglected to service the loan facility in a timely manner, and a significant amount of overdue principal and or interest payment became due and payable by the first plaintiff to the defendant. Thereafter, the loan facility became impaired on 30 April 2010.

[9] By way of the restructuring agreement executed between the first plaintiff and the defendant, and the additional security agreements concurrently executed thereunder July 2011 ('power of attorney') executed by the second plaintiff, the defendant agreed to restructure the loan facility with the express agreement, among others, that the availability period ('AP') of the

restructured loan facility would be up to 31 March 2012, and that the project shall be completed no later than 31 March 2012 (collectively referred to as 'restructured loan facility').

[10] In breach of the restructuring agreement, the plaintiffs failed to complete the project by the agreed completion date, and continuously requested for the AP of the restructured loan facility to be extended.

[11] Notwithstanding the several AP extensions granted by the defendant to the plaintiffs, and the total amount of USD9,916,313.40 disbursed to the first plaintiff under the loan facility and or restructured loan facility for the project as of 30 September 2012, the plaintiffs continued to fail, refuse and or neglect to properly manage the timeous completion of the project, and thereafter service the restructured loan facility in a timely manner.

[12] Pursuant to the plaintiffs' continuous breaches of the facility agreement and or the restructuring agreement, the defendant issued the notice of termination dated 23 May 2013 ('notice of termination') to validly terminate and recall the loan facility and or restructured loan facility.

[13] By way of the defendant's claim form dated 26 August 2019 ('claim form'), the defendant commenced the Maldives suit against the plaintiffs to enforce its rights under the facility agreement, restructuring agreement and or security agreements thereunder, and to seek for, inter alia, the following reliefs:

(a) the outstanding principal loan, interest, fines and other charges and or fees to be paid by the plaintiffs to the defendant; and

(b) in the event the plaintiffs are unable to make immediate payment of the aforesaid outstanding sums to the defendant, an order for the sale of the properties mortgaged to the defendant under the mortgage agreement, namely the Hondaafushi Island and or the Resort.

[14] In the Maldives suit, the plaintiffs are contending, inter alia, that the defendant had breached the facility agreement and or the restructuring agreement and or that the entire loan facility is illegal under the laws of Malaysia. The plaintiffs also challenged the jurisdiction of the Maldives Court to hear the Maldives suit.

[15] More specifically, on 16 January 2020, the plaintiffs filed their first procedural objection in the Maldives suit ('first procedural objection') to dismiss the defendant's Maldives suit, inter alia, on the basis that:

(a) the Maldives Court purportedly do not have jurisdiction to hear the dispute arising between the parties in the Maldives suit;

(b) the facility agreement executed between the parties is allegedly solely governed by Malaysian laws; and

(c) the defendant's claim in the Maldives suit is barred by limitation pursuant to s 6(1)(a) of the Malaysian Limitation Act, whereby the defendant had purportedly filed the Maldives suit in order to circumvent the laws of limitation in Malaysia.

[16] On 25 January 2021, the plaintiffs' first procedural objection in the Maldives suit was dismissed by the Maldives Court. Specifically, the Maldives Civil Court judgment held that:

(a) pursuant to cl 19.6 of the facility agreement, both the Maldives Court and the Malaysian Court have jurisdiction to hear the disputes between the parties in relation to the facility agreement. As such, there is no legal basis to the plaintiffs' contention that the Maldives Court does not have jurisdiction to preside over the matter;

(b) there is no justification to the plaintiffs' contention that only Malaysian laws shall be applicable to disputes arising under the facility agreement; and

(c) the Hondaafushi Island and or Resort, which are the properties mortgaged to the defendant pursuant to the mortgage agreement, are within the jurisdiction of the Maldives Government. Therefore, the authority to grant any enforcement of rights over the aforesaid mortgaged properties are solely vested in the Maldives Court.

[17] Thereafter, by way of the response form dated 23 September 2021 ('response form'), the plaintiffs filed their response to the defendant's claim form in the Maldives suit, wherein the plaintiffs had sought permission from the Maldives Court to submit a full response upon further clarifications from the defendant as to the applicable laws in the Maldives suit.

[18] On 1 March 2022, the plaintiffs filed their first statement in the Maldives suit ('first statement') to substantially rebut the merits of the defendant's claim, among others, on the basis that the amounts claimed by the defendant in the Maldives suit were purportedly unsubstantiated, and that the Maldives suit was purportedly barred by limitation and or delay.

[19] On 19 April 2022, the plaintiffs filed a second procedural objection in the Maldives suit ('second procedural objection'), whereby the plaintiffs are now seeking to strike out the Maldives suit on the basis that it was filed in the absence of a Board Resolution.

[20] To date, the Maldives Court has not accepted the plaintiffs' second procedural objection as a valid procedural objection and the second procedural objection remains undetermined by the Maldives Court.

[21] For the purposes of our present case, suffice it to state that more than three years after the institution of the Maldives suit, the plaintiff now filed the present Malaysian suit for declaratory orders, inter alia, that the facility agreement, restructuring agreement and or the security agreements thereunder are null, void and or unenforceable, and for a perpetual injunction to restrain the defendant from prosecuting its Maldives suit.

[22] The plaintiffs have also concurrently filed the anti-suit injunction application to restrain the defendant from, inter alia, prosecuting and or taking any further steps against the plaintiffs in the Maldives suit, pending the final disposal of the Malaysian suit.

[23] In turn, the defendant filed the striking out application to strike out the Malaysian suit pursuant to O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ('the ROC 2012') and or is otherwise an abuse of the court process.

THE COURT'S DELIBERATIONS

[24] I shall first consider the striking out application.

[25] It is a fundamental principle that the process of the court must be used bona fide and properly, and must not be abused. In our present case, it is my judgment that the filing of the Malaysian suit is a clear abuse of process of this court for the following reasons:

(a) the plaintiffs have already unequivocally submitted to the jurisdiction of the Maldives Court to litigate the subject matter of the present dispute;

(b) the Malaysian suit is filed with the collateral purposes of undermining and or negating the Maldives Civil Court judgment, or to defeat and or defend against the defendant's action in the Maldives suit; and

(c) the filing of the Malaysian suit offends the rule against multiplicity of proceedings.

[26] Each of the grounds shall be elaborated in turn.

Submission to jurisdiction of Maldives Court

[27] Where parties have submitted themselves to a particular jurisdiction, it is an abuse of process for one party to approbate and reprobate by instituting legal proceedings in another jurisdiction over the same subject matter. This position is supported by the Supreme Court case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 ('Habibullah') whereby Mohamed Azmi SCJ held at p 807D–I that:

> ... *Once the parties have submitted themselves to the jurisdiction of the Syariah Court, and once the Syariah Court has taken cognizance of the matrimonial cause on the ground of the husband's misconduct, it would in my view be an abuse of process under para(d) of O 18 r 19 of the RHC for Faridah to go to the High Court and complain over the same misconduct* ... Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* at p 536 had this to say:
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people ...
> >
> > Applying the above principle, *it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter* ... (Emphasis added.)

[28] This legal principle propounded by the Supreme Court in *Habibullah* was later applied by the High Court in *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105; [2001] 4 CLJ 52 whereby the court held that although the decision in *Habibullah* relates to the jurisdiction of a Syariah Court, the applicable principles in *Habibullah* pertaining to a striking out application applied equally to its case, which concerned parallel proceedings being filed in two separate High Courts.

[29] I agree with the defendant's submission that the belated filing of the Malaysian suit is an abuse of court process as the plaintiffs have already unequivocally submitted to the Maldives Court's jurisdiction to litigate the subject matter of the present dispute.

[30] In this regard, it is trite that where a defendant has challenged the jurisdiction of a foreign court over a particular dispute, but nonetheless proceeds further to plead to the merits, the said defendant would be taken to have submitted to the jurisdiction of the foreign court. This is supported by the UK Court of Appeal case of *Re Dulles' Settlement Trusts; Dulles v Vidler* [1951] Ch 842 ('Re Dulles' Settlement') whereby Denning LJ held at p 850 that:

> ... I quite agree, of course, that *if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is*

> *then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable*. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction ... (Emphasis added.)

[31] In a similar vein, Eversheed MR concurred with the preposition propounded by Denning LJ in *Re Dulles' Settlement*, and held at p 847 that:

> It is, of course, plain that *where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him. And he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits* ... (Emphasis added.)

[32] In our present case, it is not disputed that the plaintiffs have filed their first procedural objection in the Maldives suit to challenge the Maldives Court's jurisdiction over the present dispute. The grounds raised by the plaintiffs in the first procedural objection *went beyond* challenging jurisdiction, and had in fact, delved into the substantive merits of the defendant's claim in the Maldives suit. This is because the plaintiffs had expressly invoked the Maldives Court's jurisdiction to consider the limitation issue, and to strike out the Maldives suit on the basis that it was purportedly barred by s 6(1)(a) of the Malaysian Limitation Act.

[33] The relevant portions of the plaintiffs' first procedural objection in the Maldives suit in respect of the limitation issue are reproduced below for ease of reference:

> 3.18 It is part of the defendants' defence that the Claimant's claim is barred by limitation pursuant to section 6(1)(a) of the Limitation Act 1953 in Malaysia which is similar to section 2(1)(a) of the UK Limitation Act 1939 which clearly stipulates inter alia that actions founded on simple contract or tort shall not be brought after the expiration of six years 'from the date on which the cause of action accrued.
>
> 3.19 The Claimant had on 18.12.2012 issued the first letter of demand against the 1' defendant and the facility was purportedly terminated via a Notice of Termination dated 23.05.2013. Hence, the Claimant has 6 years from 18.12.2012 to commence legal actions against the defendants but the Claimant chose to only commence the present legal suit in September 2019. In other words, the Claimant's claim against the defendants which is therefore barred by limitation and unenforceable in Malaysian Law.
>
> 3.22 In order to salvage its claim and to circumvent the weaknesses which would otherwise jeopardise its Claim under the Malaysian Law, the Claimant is now taking advantage of the Law of Maldives wherein its law of limitation is still in the process of development to prosecute its claim in this Court notwithstanding the parties initial agreement to subject themselves to Malaysian Law and the jurisdiction of the Court of Malaysia as per the terms of the facility agreement.

This conduct by the Claimant should not be condoned by this Honourable Court and the Claimant's claim ought to be struck out immediately to save court's time and unnecessary costs to the parties.

[34] The above plainly shows that the limitation issue forms part of the plaintiffs' substantive defence against the defendant's claim in the Maldives suit. In other words, the limitation issue is one which goes *directly into the merits* of the defendant's claim in the Maldives suit. The plaintiffs had elected to raise the limitation issue before the Maldives Court in the first procedural objection, without any express reservation of rights and or qualifications that the said issue was raised without prejudice to the plaintiffs' purported intention to challenge the Maldives Court's jurisdiction.

[35] By invoking the Maldives Court's jurisdiction to consider the merits of the defendant's claim in the first procedural objection itself, the plaintiffs had in fact unequivocally submitted to the jurisdiction to the Maldives Court as early as 16 January 2020 (ie the date of filing of the first procedural objection in the Maldives suit), to litigate the subject matter of the present dispute.

[36] Further and or in the alternative, following the dismissal of the first procedural objection, the plaintiffs' subsequent actions and or conduct in the Maldives suit continued to demonstrate their unequivocal intention to submit to the jurisdiction of the Maldives Court to litigate the present dispute. This is clearly reflected in the various further steps taken by the plaintiffs to defend against the defendant's action in the Maldives suit, as summarised below:

DATE	FURTHER STEP TAKEN IN THE Maldives suit	NATURE OF STEP TAKEN	EFFECT OF STEP TAKEN
23 September 2021	Filing of the plaintiffs' response form	Plaintiffs had sought permission from the Maldives Court to submit a full response to the defendant's claim upon further clarifications from the defendant as to the applicable laws in the Maldives suit.	Clear indication of the plaintiffs' unequivocal intention to

DATE	FURTHER STEP TAKEN IN THE Maldives suit	NATURE OF STEP TAKEN	EFFECT OF STEP TAKEN
1 March 2022	Filing of the plaintiffs' first statement	Plaintiffs sought to substantially rebut the merits of the defendant's claim in the Maldives suit, inter alia, on the basis that the amounts claimed by the defendant in the Maldives suit were purportedly unsubstantiated, and that the Maldives suit was purportedly barred by limitation and/or delay.	Defend against the defendant's claim in the Maldives suit, and to litigate the subject matter of the present dispute before the Maldives Court.
19 April 2022	Filing of the plaintiffs' second procedural objection	Plaintiffs had invoked the jurisdiction of the Maldives Court to strike out the Maldives suit on the basis that it was filed in the absence of a Board Resolution.	

[37] It is important to note that at the material time the aforementioned further steps were taken by the plaintiffs in the Maldives suit, there was a complete absence of reservation of rights and or indication on the plaintiffs' part that they had intended to continue challenging the Maldives Court's jurisdiction over the present dispute, notwithstanding the fact that the Maldives Court is clearly seised with jurisdiction to adjudicate the dispute following the dismissal of the plaintiffs' jurisdictional challenge.

[38] In this regard, if the plaintiffs had genuinely intended to continue to contest the Maldives Court's jurisdiction, questions have to be asked as to why the plaintiffs have failed and or omitted entirely to indicate such an intention to the defendant and the Maldives Court for more than 20 months after the first procedural objection had been dismissed.

[39] The plaintiffs' action and or conduct in the Maldives suit following the dismissal of the first procedural objection clearly demonstrated their unequivocal intention to submit to the jurisdiction of the Maldives Court.

[40] Premised on the foregoing, it is clear that the filing of the Malaysian suit and or the anti-suit injunction application to belatedly contest the jurisdiction of the Maldives Court over the present dispute is merely an afterthought on the plaintiffs' part in an attempt at forum shopping. Having unequivocally submitted to the Maldives Court's jurisdiction to litigate the subject matter of the present dispute, the plaintiffs cannot be allowed to blow hot and cold or approbate and reprobate by belatedly challenging the jurisdiction of the Maldives Court and at the same time invoking the Maldives Court's jurisdiction to consider the merits of their defence in the Maldives suit. This amounts to a clear abuse of process on the plaintiffs' part, which warrants a striking out of the Malaysian suit.

Malaysian suit filed for collateral purpose

[41] Another ground for striking out the Malaysian suit can be supported by the fact that the plaintiffs' real and or dominant purpose in filing the Malaysian suit was not to obtain genuine redress. Instead, the plaintiffs initiated these proceedings more than three years after the filing of the Maldives suit, were hoping to achieve the following collateral purposes and or ulterior motives:

(a) to use the Malaysian suit as an instrument to undermine and or negate the Maldives Civil Court judgment, and to relitigate the jurisdictional and limitation issues before the Malaysian Court, despite having previously failed to obtain a favourable ruling from the Maldives Court on these very same issues; and

(b) to defend against and or defeat the defendant's action in the Maldives suit, which was at all material times properly instituted in good faith.

[42] This situation finds some parallels with the High Court case of *Perkasa Padu Sdn Bhd v Rayong ak Nuing & Ors* [2009] 1 MLJ 268 where the plaintiffs had instituted a claim against the defendants in the Malaysian Court for, inter alia, a declaration that the employment agreement between plaintiffs and the first defendant is null and void, and an anti-suit injunction to restrain the defendants from prosecuting its suit which was filed earlier in the United States. In dismissing the entirety of the plaintiffs' suit, Hamid Sultan JC (as His Lordship then was) held at p 282A–C that:

> I have heard the evidence, read the documents and submissions of the parties in detail. *I take the view that the plaintiffs' suit must be dismissed*. My reasons are as follows:
>
> (ii) In this case, *the plaintiffs are not seeking a substantial remedy in this court. The whole purpose of the said declaratory order and/or injunctive order is for a collateral purpose that too, to defeat or to defend an action in a foreign jurisdiction. On such facts, court will be reluctant to exercise its discretion when it is seen to be a case of multiplicity of proceedings and/or collateral purpose*. (Emphasis added.)

[43] Similarly, in the present case:

(a) by way of the Maldives suit, the defendant is primarily seeking to enforce its rights under the facility agreement, restructuring agreement and or security agreements (collectively, 'loan agreements') against the plaintiffs to recover the outstanding sums due and owing by the plaintiffs to the defendant;

(b) by way of the present Malaysian suit filed more than three years later, the plaintiffs are now seeking for:

(i) declarations that the very same loan agreements are null, void and or unenforceable and that the defendant is not entitled to any claims against the plaintiffs under the restructuring agreement; and

(ii) perpetual injunctions to restrain the defendant from prosecuting its Maldives suit and or prosecuting any other proceedings premised on the loan agreements against the plaintiffs other than in Malaysia, while simultaneously seeking a declaration that any claims by the defendant against the plaintiffs is time-barred in Malaysia under s 6 of the Limitation Act.

[44] In these circumstances, it is as clear as day that the plaintiffs had commenced the Malaysian suit with the collateral purpose of defeating the defendant's action in the Maldives suit. On this basis alone, the Malaysian suit amounts to a blatant abuse of court process.

Multiplicity of proceedings

[45] In fact, the filing of the Malaysian suit also falls foul of the rule against multiplicity of proceedings. Where the commencement of an action gives rise to a multiplicity of proceedings, s 25(2) of the Courts of Judicature Act 1964 ('the CJA 1964') read together with item 11 of the Schedule to the CJA 1964 expressly provides for the High Court's power to dismiss or stay such proceedings.

[46] The rationale behind the rule against multiplicity of proceedings was considered by the Court of Appeal in *Orange Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd and another suit* [2019] MLJU 477; [2019] 1 LNS 771 ('Orange Business'), whereby Harmindar Singh Dhaliwal JCA (as His Lordship then was) held at [17]–[18] that:

> *The objection to multiplicity of proceedings is wellgrounded and underscored by the public interest to avoid conflicting decisions by two different courts on the same issue between parties … Conflicting decisions on the same issue not only brings embarrassment to the court or tribunal but may also undermine public confidence in the administration of justice.*

> Authorities on the point also suggest that *having multiple actions on the same issues is an abuse of process giving power to the court to act accordingly by striking out any such action* or actions ... (Emphasis added.)

[47] The subject matter of the present action is identical to that of the defendant's Maldives suit, which was filed more than three years ago — namely a claim for an alleged breach of contract premised upon the loan agreements. For this reason, the Malaysian suit raises the very same facts and issues arising out of and or in connection with the same agreements, which is currently being litigated by the same parties before the Maldives Court in the Maldives suit.

[48] To exacerbate the situation, the reliefs sought by the plaintiffs in the Malaysian suit is in direct conflict with the reliefs sought by the defendant in the ongoing Maldives suit because:

(a) on one hand, the defendant is seeking to enforce its rights under the loan agreements against the plaintiffs to recover the outstanding sums owed by the plaintiffs; and

(b) while on the other hand, the plaintiffs are now seeking to declare the very same loan agreements, which form the basis of the defendant's claim against the plaintiffs in the Maldives suit, to be null, void and or unenforceable so as to deny the defendant's entitlement to any claims thereunder.

[49] As rightly contended by the defendant, if both actions are allowed to proceed in their respective jurisdictions, there is a significant risk of conflicting decisions being rendered by both courts on the same subject matter. This is plainly contrary to the very principle underlying the rule against multiplicity of proceedings (see the Court of Appeal in *Orange Business* at [17]). Bearing in mind that the plaintiffs had already unequivocally submitted to the jurisdiction of the Maldives Court to litigate the subject matter of the present dispute, the belated filing of the Malaysian suit which gives rise to a multiplicity of proceedings is a clear abuse of process by the plaintiffs. This warrants the immediate striking out of the Malaysian suit by this court.

[50] With my determination that the Malaysian suit ought to be struck out, there is strictly speaking no necessity to deal with the anti-suit injunction application. However, for the sake of completeness and in the event that the decision to strike out is set aside on appeal, I shall proceed to deal with the anti-suit injunction application.

The anti-suit injunction

[51] The relevant principles governing the grant of an anti-suit injunction

are laid down in the Court of Appeal case of *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70 ('BSNC Leasing') whereby Gopal Sri Ram JCA (as His Lordship then was) held at pp 89–91 that:

> ... *where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive*. This presupposes that, *as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action*, and *further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so*. So, *as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him*.
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> ...
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> In my judgment whether the institution or threatened institution of proceedings in a foreign court would be vexatious or oppressive would depend upon the peculiar facts of the particular case. When deciding this question, *a court must have regard to all the circumstances of the case including such matters as comity, the interests of the parties, the connection that the dispute has with the alternative forums and the need to exercise caution when restraining foreign proceedings* ... (Emphasis added.)

[52] Arising from the above, the applicable three-stage test for the granting of an anti-suit injunction to restrain foreign proceedings, as distilled by the Court of Appeal in *BSNC Leasing* are as follows:

(a) whether the foreign proceedings are vexatious or oppressive;

(b) whether the Malaysian Court or the foreign court is the *forum conveniens* to determine the dispute between the parties; and

(c) whether the balance of justice lies in favour of restraining the foreign proceedings, having regard to the interests of the parties and the need to exercise caution so as to not infringe the principle of comity.

[53] The burden to prove that the foreign proceedings are vexatious or oppressive lies with the applicant (ie the plaintiffs in our present case).

[54] It is accepted that the granting of an anti-suit injunction, though operating *in personam* against the defendant, would inevitably interfere with the process of a foreign court. For this reason, it is trite that the principle of comity requires the court to exercise its jurisdiction to grant an anti-suit injunction with the utmost caution: *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak & Ors* [1987] 2 MLJ 397 (PC) ('Aerospatiale').

[55] At this juncture, it is pertinent to draw a distinction between cases where a party had commenced actions concurrently in two jurisdictions, and cases where a party had only commenced its action in one jurisdiction. Where one party has legally exercised its right to commence foreign proceedings, the court ought to be extremely cautious in granting an injunction to restrain the said foreign proceedings such that an injunction can only be granted in the *clearest of circumstances* that the foreign proceedings are vexatious or oppressive. This is supported by the Singaporean Court of Appeal case of *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121 ('Koh Kay Yew') where the court applied the *Aerospatiale* and held as follows:

> Further, *in dealing with cases such as the present one, where the appellant had only started proceedings in one jurisdiction, the courts should be more cautious than not in granting injunctions compared with situations, in which a party had commenced actions concurrently in two jurisdictions*. In the latter situations, it is understandable that any court should feel uncomfortable about allowing both actions to go on ...
>
> However, in the former scenario, as it is with the present case, the situation would be quite the opposite. *The party who commenced the foreign proceedings would only have done so in one jurisdiction. He would have in no way abused the systems of justice of various jurisdictions to his advantage. It is the defendant in the foreign proceedings that is complaining about the action and wants the foreign proceedings stopped. In such a case, we think that as long as the party who commenced the foreign proceedings was entitled to do so, whether or not the foreign courts recognise this, then our courts should be extremely cautious in granting an injunction. In other words, an injunction in this situation should not be given with the same degree of ease as compared with the latter scenario. For an injunction in these cases to be justified, there must be strong and compelling reasons why an action in the foreign courts should not be started or continued* ... A court's role is to achieve fairness and justice according to the law of the land. However, this does not include preventing a party from commencing or continuing his foreign proceedings simply on the basis that it would be more inconvenient for one party as compared to the other. Any party who has been aggrieved has the right to seek recourse to justice in any judicial system that is convenient for him. This is his natural right. It is not up to a plaintiff to bring an action in a court which is convenient for the defendant. A defendant, if he had truly done some wrong to a plaintiff, should bear the consequence of having to defend the action, wherever that place of litigation might be ... *All these must be subject to the fact that the plaintiff must have had good grounds for commencing an action in the place he has chosen* ...
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> ...
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> ... *In our opinion, it must be only in the clearest of circumstances that the foreign proceedings are vexatious or oppressive before an injunction can be granted and justified. Otherwise any injunction so granted would not only be against Lord Goff's principles but also a deprivation of the rights of a party to sue in the jurisdiction which is most convenient for him and which he is clearly entitled to*.

[56] The decided authorities above are to the effect that:

A (a) if the plaintiff in the foreign proceedings was legally entitled to commence his action in the foreign court; and

(b) if there are good grounds for the plaintiff to commence his action in the foreign court,

B an anti-suit injunction in respect of the foreign proceedings should *not* be granted to deprive the plaintiff of his right to sue in the jurisdiction which is most convenient for him and which he is clearly entitled to.

C **[57]** Reverting to our present case, the defendant's Maldives suit was at all material times properly instituted against the plaintiffs. This is especially in view of the defendant's legal right and or entitlement under the facility agreement and or restructuring agreement to commence its action in the Maldives Court, whereby:

D (a) cl 19.16(a) of the facility agreement (with an identical provision under cl 19.15(a) of the restructuring agreement) is clear and unequivocal that the facility agreement and or restructuring agreement is governed by and shall be construed in accordance with, the laws of Malaysia and or any applicable laws acceptable to the defendant:

E 19.16 Governing law and jurisdiction

(a) This Agreement is governed by, and shall be construed in accordance with, the laws of Malaysia and/or any other applicable law acceptable by the Bank.

F (b) cl 19.16(f) of the facility agreement (with an identical provision under cl 19.15(f) of the restructuring agreement) is clear and unequivocal as to the defendant's legal right and or entitlement to institute legal proceedings against the plaintiffs in any jurisdiction:

G (f) The submission to the jurisdiction of the courts of Malaysia shall not (and shall not be construed so as to) limit the right of the Bank to take legal proceedings against the Borrower in any other jurisdiction whatsoever, nor shall the taking of legal proceedings in any one or more jurisdiction preclude the taking of legal proceedings in any other jurisdiction, whether concurrently or not.

H (c) the defendant's contention herein is further fortified by the Maldives Civil Court judgment, which affirms the defendant's position that it was entitled to commence its claim against the plaintiffs in the Maldives Court. It is also not disputed by the plaintiffs in their affidavit evidence that the defendant has the legal right and or entitlement to institute legal proceedings against the plaintiffs in any jurisdiction;

I

(d) further, at the material time the Maldives suit was filed, it was also necessary and or imperative that the defendant's claim against the plaintiffs for breach of contract was filed before the Maldives Court for three reasons:

(i) the reliefs sought by the defendant against the plaintiffs include, among others, an order for the sale of the properties mortgaged to the defendant *vide* the mortgage agreement, namely the Hondaafushi Island and or Resort. As expressly held in the Maldives Civil Court judgment, the said mortgaged properties lie solely within the jurisdiction of the Maldives Government such that the authority to grant any enforcement of rights over the properties are solely vested in the Maldives Court. On this basis alone, the necessity for the defendant to bring its action before the Maldives Court is irrefutable;

(ii) at the time the Maldives suit was filed, procedural regulations of the Maldives do not allow for judgments made by a court outside of the Maldives to be enforced by the Maldives Court. This raised legitimate concerns on the defendant's part that any judgment made by the Malaysian Courts in favour of the defendant would ultimately be rendered nugatory, as the defendant would not be able to enforce the same against the plaintiffs in the Maldives Court. Such concern is no doubt heightened by the fact that the plaintiffs are at all material times, a company incorporated under the laws of the Maldives and or citizens of the Maldives — with all their assets located within the jurisdiction of the Maldives; and

(iii) there is no reciprocal enforcement of judgment regime between Malaysia and Maldives to date. Therefore, even if the abovementioned hurdles are set aside, the defendant would still face considerable difficulties in enforcing any successful Malaysian judgment in the Maldives Court, and may have to file fresh proceedings in the Maldives based on the judgment obtained in Malaysia, which is plainly counterproductive.

[58] Premised on the foregoing submissions, it is clear that there are cogent reasons and or grounds warranting the filing of the defendant's Maldives suit as the Maldives Court, being vested with the sole authority to grant the full relief sought by the defendant against the plaintiffs. The Maldives suit can not be said to be vexatious or oppressive at all.

[59] In fact, the Maldivian Court stood as the most appropriate forum and or *forum conveniens* for the present dispute at the material time the Maldives suit was filed. *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ('Spiliada Maritime').

[60] Where proceedings are first brought before a foreign court, the principle of comity dictates that it is prima facie for the foreign court to decide whether or not it is the appropriate forum for the dispute, and that the domestic court should not interfere with the foreign court's determination save in exceptional circumstances where the foreign proceedings are vexatious or oppressive.

[61] In the UK Court of Appeal case of *Barclays Bank plc v Homan and others* [1993] BCLC 680 ('Barclays Bank'), Hoffman J held at first instance that both comity and common sense suggest that the foreign judge is usually the best person to decide in his own court whether he should accept or decline jurisdiction. In affirming the judgment of Hoffman J on appeal, the UK Court of Appeal held at pp 701–703 that:

> The judge then made the comment to which I have already referred, that while in theory the jurisdiction operates as an order addressed to the individual plaintiff, in practice in many cases it is, or is seen as being, an interference with the exercise by the judge of the foreign court of his jurisdiction. Hoffmann J then continued (at 686, 687, ante):
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> > ... Today the normal assumption is ... *that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue... In other words, there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there* ...
>
> ...
>
> ... his reference to the normal assumption can only be read as a reference to the principle to which I have already referred, ie that *where the foreign proceedings are not vexatious or oppressive, it is prima facie for the foreign court to decide whether or not it is the appropriate forum for the decision of the suit before it. In this respect, I agree with Hoffmann J.* (Emphasis added.)

[62] In our present case, it is not disputed that by way of the Maldives Civil Court judgment, the Maldives Court had already determined that it has the requisite jurisdiction to adjudicate upon the present dispute.

[63] Further, in determining where the balance of justice lies, the general rule is that the court should *not* grant an anti-suit injunction if, by doing so, it will deprive the plaintiff (in the foreign proceedings) of advantages in the foreign forum of which it would be unjust to deprive him.

[64] In the present case, the balance of justice lies in favour of refusing the anti-suit injunctions sought by the plaintiffs for four reasons:

(a) in the event the defendant is restrained from prosecuting its *bona fide* claim against the plaintiffs in the Maldives suit, serious and irreparable prejudice would be occasioned to the defendant as it would be unjustly

deprived of the legitimate advantages it would have derived from having the present dispute heard in the Maldives. On this basis alone, the balance of justice clearly lies in favour of refusing the anti-suit injunctions sought;

(b) the filing of the Malaysian suit and or anti-suit injunction application is a clear abuse of court process as it was filed with the collateral purpose of defeating the defendant's action in the Maldives suit. Such abuse cannot be condoned by this court, and justice dictates that the anti-suit injunction application must necessarily fail on this ground;

(c) the plaintiffs would not suffer any prejudice if the present dispute were heard before the Maldives Court because:

(i) the plaintiffs themselves are a company incorporated in the Maldives and or are individuals residing permanently in the Maldives. As such, there is no inconvenience occasioned to the plaintiffs if the dispute is likewise dealt with in the Maldives;

(ii) the plaintiffs had already unequivocally submitted to the jurisdiction of the Maldives Court to litigate the subject matter of the present dispute a long time ago; and

(iii) the plaintiffs would still be able to present their defence before a competent Maldives Court.

(d) there has been an inordinate delay of more than three years on the plaintiffs' part in filing the present anti-suit injunction application, with no reasonable explanation being proffered by the plaintiffs to justify such an inordinate delay.

[65] An anti-suit injunction is ultimately an equitable relief, the granting of which requires consideration as to whether there had been a delay in the making of the application as an injunction should not be made available to a party who has slept on its rights.

[66] In the UK Court of Appeal case of *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231, the claimant's application for anti-enforcement injunction had been dismissed at first instance due to the claimant's delay in seeking the equitable relief. The claimant's appeal was subsequently dismissed by the UK Court of Appeal, and the court held at pp 2259–2262 that:

> 122 ... An injunction is an equitable remedy. Before granting it the court must consider whether it is appropriate to do so having regard to all relevant considerations...
>
> 123 *A relevant consideration, particularly in relation to interlocutory relief, as was sought in the present case, is whether the party seeking an injunction has acted with appropriate speed. The longer a respondent continues doing that which the applicant*

seeks to prevent him from doing, the greater the amount of labour and cost that he will have expended which could have been avoided.

129 ... the tenor of modern authorities is that *an applicant should act promptly and claim injunctive relief at an early stage; and should not adopt an attitude of waiting to see what the foreign court decides*...

133 ... *the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force*.

137 In short, *both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch* ... (Emphasis added.)

[67] Premised on the plaintiffs' inordinate delay in filing the injunction application, the granting of an injunction to restrain the Maldives suit at this stage would present a great and undue interference in the judicial process of the Maldives Court, contrary to the principle of comity. Specifically:

(a) the Maldives Court had already expended a substantial amount of judicial time and resources on the Maldives suit, including the determination of the plaintiffs' first procedural objection in the action and the consequent issuance of the Maldives Civil Court judgment. If an injunction is granted, this will inevitably result in wasted expenditure of precious judicial time and resources by the Maldives Court;

(b) by way of the Maldives Civil Court judgment, the Maldives Court had already determined that it has the requisite jurisdiction to adjudicate upon the subject matter of the present dispute. This court ought to be reluctant to interfere with the Maldives Court's discretion to decide on its own jurisdiction; and

(c) following the dismissal of the first procedural objection, the Maldives suit had already advanced past the initial trial process, and had moved onto the next stage of trial, as evidenced by the legal opinion prepared by Dr Hassan Saeed who is an expert in Maldivian law. As such, the granting of an injunction at this stage to belatedly restrain the Maldives suit would present a great interference in the judicial process of the Maldives Court.

[68] Accordingly, the defendant itself would be unfairly prejudiced in the event an injunction is granted to restrain the defendant's claim in the Maldives suit as the defendant had already expended a significant amount of costs, time and effort to pursue its claim against the plaintiffs in the Maldives suit, and to defend against the plaintiffs' procedural objections in the Maldives suit which was filed in a piecemeal fashion before the Maldives Court.

[69] If the plaintiffs had genuinely intended to challenge the jurisdiction of the Maldives Court, they ought to have promptly filed the present anti-suit injunction application as soon as the Maldives suit was filed in August 2019, or at the very latest, immediately after the first procedural objection was dismissed in January 2021.

[70] In these circumstances, the balance of justice clearly lies in favour of dismissing the anti-suit injunction application as the court will not entertain the stale demands of the plaintiffs who have slept on their rights, particularly at the risk of infringing the principle of comity.

[71] For these reasons above, the anti-suit injunction application must fail.

CONCLUSION

[72] In the premises, this court allowed the defendant's application under encl 14 and dismissed the plaintiffs' application under encl 3 with costs.

Defendant's application allowed and plaintiffs' application dismissed.

Reported by Nabilah Syahida Abdullah Salleh